

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2019-224-E
DOCKET NO. 2019-225-E

In the Matter of:)	DUKE ENERGY CAROLINAS,
)	LLC’S AND DUKE ENERGY
South Carolina Energy Freedom Act)	PROGRESS, LLC’S MOTION TO
(House Bill 3659) Proceeding Related to)	COMPEL ANSWERS TO
S.C. Code Ann. Section 58-37-40 and)	INTERROGATORIES BY SOUTH
Integrated Resource Plans for Duke)	CAROLINA SOLAR BUSINESS
Energy Carolinas, LLC and Duke Energy)	ALLIANCE
Progress, LLC)	

Pursuant to S.C. Code Ann. Regs. 103-829, 103-833, and 103-835 and Rules 26, 33(a), 34(b) and 37(a) of the South Carolina Rules of Civil Procedure, Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP”) (collectively the “Companies”), by and through counsel, respectfully move the Public Service Commission of South Carolina (the “Commission”) for an order compelling Intervenor South Carolina Solar Business Alliance (“SCSBA”)¹ to respond to Interrogatory Nos. 1-24(c)-(i), 1-25, 1-26, 1-27, and 1-28 of the Companies’ First Set of Requests for Production of Documents and Interrogatories to SCSBA and require SCSBA to answer additional interrogatories propounded by the Companies, including those included in the Companies’ Second and Third Sets of Requests for Production of Documents and Interrogatories to SCSBA. In light of the Companies’ impending rebuttal testimony filing deadline of March 19, 2021,

¹ In Order No. 2021-167, issued on March 10, 2021, the Commission granted SCSBA’s motion to be substituted as a party of record in these and other dockets by Carolinas Clean Energy Business Association (“CCEBA”). For consistency with previously-filed documents, this motion refers to this intervenor as SCSBA.

and the corresponding need for the withheld information in the Companies' preparation of rebuttal testimony, the Companies' respectfully request an expedited order on this motion from a hearing officer pursuant to S.C. Code Ann. Regs. 103-804(G). Prior to the filing of the instant Motion, undersigned counsel for the Companies communicated orally and in writing with opposing counsel and has attempted in good faith to resolve the matter contained in the Motion, and will continue to do so. However, due to the press of time and approaching deadline for rebuttal testimony, the Companies file this Motion contemporaneously with such efforts.

In support of this Motion, the Companies state the following:

I. INTRODUCTION AND BACKGROUND

On May 8, 2019, the South Carolina General Assembly amended the code of laws of South Carolina to enact the Energy Freedom Act, or Act 62. Under Act 62, DEC and DEP must each submit an integrated resource plan ("IRP") to the Commission once every three years. *See* S.C. Code Ann. 58-37-40(A). Act 62 expressly allows for intervention by interested parties and gives them an opportunity to comment on the "reasonableness and prudence of the plan" and to raise "alternatives to the plan." *See* S.C. Code Ann. 58-37-40(C)(1). Act 62 gives all parties to the IRP proceedings an opportunity to conduct "reasonable discovery" to develop the evidentiary record. *Id.* Act 62 further requires that, within 300 days of filing, the Commission issue a "final order approving, modifying, or denying the plan" filed by the Companies. *Id.*

Having received SCSBA's direct testimony at 8:43 p.m. on February 5, 2021, the Companies worked diligently to review the testimony and served SCSBA with their First Set of Requests for Production of Documents and Interrogatories five business days later

on February 12, 2021. Twenty days later, SCSBA served its answers and objections to the Companies' discovery on March 4, 2021 ("Response").

In its Response, SCSBA objected to Interrogatory Nos. 1-24(c)-(i), 1-25, 1-26, 1-27, and 1-28. SCSBA did not object to these interrogatories alleging that they were excessively burdensome, unreasonable, or otherwise outside the scope of permissible discovery. *See* Rule 26, SCRCP. Instead, SCSBA asserted that the Companies asked too many questions:

1-24. Referring to SBA Witness Olson's testimony discussing his use of the E3 RECAP model to calculate ELCC values for DEC and DEP, please explain, identify and/or provide the following:

- c. Provide the LOLE by month for each solar penetration studied in the RECAP Model for DEC and DEP as well as a 12x24 of all LOLE events.
- d. Provide the monthly LOLE results for the analysis provided in Figure 9 in Exhibit AO-2 as well as a 12x24 of all LOLE events.
- e. Provide the RECAP solar ELCC calculations by winter and summer season for each solar penetration for both DEP and DEC.
- f. Please provide all EFOR data by season and month used in the RECAP model.
- g. Provide details of imports modeled in RECAP, and explain exactly how this was captured.
- h. Provide details of DR modeling including capacity, and hourly dispatches used.
- i. Identify how many and which weather years were used in the RECAP modeling and explain the reasoning for including the identified weather years.

ANSWER:

- c. SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.
- d. SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.
- e. SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.

- f. SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.
- g. SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.
- h. SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.
- i. SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.

1-25. Referring to SBA Witness Olson's testimony discussing his use of the E3 RECAP model to calculate ELCC values for DEC and DEP, please explain in detail:

- a. Has E3 conducted any benchmarking of the RECAP model to other loss of load probability models? If so, please provide the conclusions of the benchmarking.
- b. How long has the RECAP model been in use?
- c. Who are current users of the RECAP model (other than E3)?
- d. Have RECAP modeling results been accepted by any State Public Service Commissions or Regulatory Authorities? If so, please identify the State Public Service Commissions or Regulatory Authorities and describe the specific applications for which RECAP was used including providing the docket number of the proceeding, if applicable.

Answer: SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.

1-26. Referring to SBA Witness Olson's Exhibit AO-2, p.4, Item 5 states: "Duke's assumption of fixed-tilt solar instead of tracking diminishes the capacity value of solar. Currently, nearly all the utility scale solar being built in the US is tracking solar which has improved ELCCs due to its ability to track the sun," please explain whether you analyzed the validity of this statement for the southeast, specifically North Carolina and South Carolina and provide any analysis, workpapers or other Documents that you relied upon that shows the percentage of fixed versus tracking utility scale solar for the southeast, specifically North Carolina and South Carolina.

Answer: SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.

1-27. With respect to SBA Witness Olson's testimony on page 5 that "[i]ncorporat[ing] climate policy and the impact of climate change" are "IRP best practices," please identify:

- a. All other State Public Service Commissions or Regulatory Authorities of which Mr. Olson is aware that have required a utility to develop an analysis or planning scenario for resource planning purposes to incorporate climate policy and the impact of climate change as an IRP best practice.
- b. All other State Public Service Commission or Regulatory Authorities of which Mr. Olson is aware that have determined that incorporating climate policy and the impact of climate change is an IRP best practice in the context of utility resource planning.
- c. All utilities of which Mr. Olson is aware that have developed an integrated resource plan that incorporates climate policy and the impact of climate change in selecting new capacity resources over and above compliance with existing legal and regulatory requirements.
- d. Please identify the docket number for any State Public Service Commission or Regulatory Authority proceeding and identify and provide any Documents that Mr. Olson relied upon in responding to subparts a.-c. of this request.

Answer: SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.

1-28. As provided in the instructions to these Interrogatories, if a privilege or objection as to any Request is claimed, identify with specificity the matter as to which the privilege or objection is claimed, the nature of the privilege or objection, the legal and factual basis for each such claim, and a complete description of the information or document being withheld.²

Answer: SCSBA objects to this Interrogatory and all subsequent Interrogatories because Duke has exceeded the 50 Interrogatories, including parts and subparts, allowed by Rule 33(b)(9) of the South Carolina Rules of Civil Procedure.

² Recognizing the limited time period that the Companies are afforded to conduct discovery, the Companies included Interrogatory 1-28 out of an abundance of caution to ensure any objections were fully presented at the time responses were produced.

The Companies have also propounded two additional sets of interrogatories upon SCSBA, together containing 20 additional interrogatories targeted to more fully understand and assess the basis of the opinions and alternative recommendations contained in the pre-filed testimony of SCSBA's two witnesses. While the deadline to respond to Companies' Second and Third Sets of Requests for Production of Documents and Interrogatories to SCSBA has not yet expired, SCSBA has indicated to the Companies that it intends to object to those interrogatories, and any future interrogatories not yet propounded, on the same grounds.

SCSBA's objections are not only legally baseless, but also contrary to the spirit of transparency and reasonable exchange of information, to which the Companies have subscribed in good faith throughout this proceeding. The objections seek to restrict the Companies' ability to fully review the testimony of SCSBA's witnesses, and by extension, have the effect of limiting the Commission's ability to fully evaluate the reasonableness and prudence of SCSBA's proposed alternatives to the Companies' IRPs.

The Companies have fully complied with SCSBA's requests to receive information from the Companies in these proceedings, and respectfully request the Commission compel SCSBA to do the same. SCSBA has exercised its rights under Act 62 to affirmatively raise "alternatives to the [Companies'] plan[s]" for consideration in these proceedings, and the Companies respectfully seek an expedited order from the Commission compelling SCSBA to answer Interrogatory Nos. 1-24(c)–(i), 1-25, 1-26, 1-27, and 1-28 and all interrogatories thereafter.

II. ARGUMENT

A. Act 62 Directs the Commission to “Permit Reasonable Discovery” on “Alternatives to the [Companies] Plans” in IRP Proceedings.

Act 62 tasks the Commission with determining whether the IRP proposed by a utility is the “most reasonable and prudent means of meeting energy and capacity needs[.]” To facilitate that analysis, Act 62 expressly sets expectations for discovery, ordering the Commission to “permit reasonable discovery . . . to assist parties in obtaining evidence concerning the integrated resource plan, including the reasonableness and prudence of the plan *and alternatives to the plan raised by intervening parties*[.]” S.C. Code Ann. § 58-37-40(C)(1) (emphasis added). In other words, the General Assembly viewed “reasonable” discovery as a necessary component of IRP proceedings to assist *all* parties and the Commission in evaluating utilities’ IRPs *as well as* the alternative recommendations proposed by intervenors. *See* S.C. Code Ann. § 58-37-40(C)(1). In furtherance of transparency and the parties’ rights to evaluate the utilities’ IRPs, the Companies have provided voluminous information to SCSBA, ORS, and other intervenors in these proceedings without objection to the quantity of interrogatories propounded. In contrast, SCSBA’s objections reveal that it is reluctant to adopt similar standards of transparency for its witnesses’ alternative recommendations, even though Act 62 directs that those alternatives should be subject to similar scrutiny.

On February 5, 2021, SCSBA’s counsel submitted a discovery request via email to undersigned counsel, asking the Companies to produce (1) all documents produced to other parties in these proceedings; and (2) all discovery produced in the ongoing parallel 2020 North Carolina integrated resource planning proceeding before the North Carolina Utilities Commission in Docket No. E-100, Sub 165 (“NCUC 2020 IRP Proceeding”). This

discovery request, through two questions, incorporated by reference approximately 3,200 interrogatories and document requests, including subparts, to which the Companies have responded in the instant proceedings and in the NCUC 2020 IRP Proceeding. The number is striking when compared to the 83 interrogatories, including subparts, the Companies have propounded on SCSBA to date.

Consistent with Act 62's standard of facilitating "reasonable" discovery, the Companies promptly provided SCSBA's requested information, and in fact produced it to SCSBA the same day the request was received. SCSBA's request for the Companies to provide responses to approximately 3,200 discovery requests, but yet refusal to answer more than 50 interrogatories from the Companies (based merely on the number itself) demonstrates an entirely unjust application of the discovery rules and creates an improper double standard. SCSBA cannot employ Rule 33(b) to evade reasonable discovery from a party, while requesting that same party to provide limitless discovery upon request in the same proceeding. SCSBA cannot have it both ways.

Act 62 makes clear that "reasonable" discovery of both the proposed IRP and any alternative recommendations should be allowed in IRP proceedings to inform the parties and the Commission. The discovery requested, and objected to by SCSBA, is necessary for the Companies to reasonably investigate and evaluate SCSBA's alternative proposals and so that the Commission will ultimately hear fully informed responses from the Companies as to SCSBA's proposals. The Companies assert that the Commission should compel SCSBA to respond to the Companies' interrogatories to avoid arbitrary application of South Carolina discovery rules and to ensure a full and developed record.

B. The Commission's Rules of Practice and Procedure Do Not Contain Any Quantitative Interrogatory Limits.

Setting aside the fact that Act 62 specifically provides for reasonable discovery as an essential component of IRP proceedings, SCSBA's attempt to apply an interrogatory limit on the Companies is contrary to the Commission Rules of Practice and Procedure governing discovery. *See* S.C. Code Ann. Regs. 103-833. In particular, Commission Rule 103-833(B) provides that "[a]ny party of record may serve upon other parties . . . written interrogatories to be answered by the party served. . . . Each interrogatory shall be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer." *Id.* (emphasis added). The Rule goes on to prescribe time limits for serving and responding to interrogatories, require verification, and establish procedure for filing with the Chief Clerk. *Id.* Unlike Rule 33 of the South Carolina Rules of Civil Procedure, the Commission Rule does not contain any limitation on the number of interrogatories that may be propounded by one party to another.

Commission Rule 103-835 provides that the "S. C. Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations." Here, however, the procedure for propounding and responding to interrogatories is covered in detail by the Commission's Rules. While the Commission chose to incorporate many aspects of Rule 33, even borrowing significant language from Rule 33(a), it did not adopt any of the procedures or limitations set forth in Rule 33(b).³ This omission is not surprising given that Rule 33(b) was drafted to facilitate discovery in adversarial litigation. For example,

³ In Docket No. 2005-345-A, the Commission initiated a review of its regulations to conform to the Commission's new structure under Act 175. The Commission adopted changes to Rule 103-833 (formerly Rule 103-851) to, for example, change the number of days a party has to respond to discovery requests from 10 days to 20 days. The Commission also removed the previous regulation permitting "data requests" (Rule 103-853). None of the commenting parties raised an issue with imposing a numerical limit on interrogatories or the applicability of Rule 33(b).

Rule 33(b)(1)-(8) sets out a number of “standard” interrogatories to be used by the parties: (1) the names of “witnesses” and any “written or recorded statements” made by each; (2) a list of “photographs, plats, sketches or other documents . . . that relate to the claim or defense;” (3) names of physicians who have treated the injured party, if any; (4) names of insurance companies “which have liability insurance coverage relating to the claim;” (5) “an itemized statement of damages;” (6) names of any expert witnesses; (7) a short statement of the “facts known to or observed by” each witness; and (8) proper identification of the defendant. Rule 33(b)(1)-(8), SCRCP. In addition to these “standard” interrogatories, Rule 33(b)(9) provides that “the court *may order* additional interrogatories for good cause shown[,]” but that “the total number of general interrogatories to any one party shall not exceed fifty questions including subparts, except by leave of court upon good cause shown.” *Id.* (emphasis added). In other words, aside from the “standard” interrogatories which are almost entirely inapplicable to proceedings before the Commission, a strict reading of Rule 33(b)(9) provides that a party must *seek leave from the court* to ask *any* additional questions. It is thus no surprise that the Commission declined to incorporate the limiting provisions of Rule 33(b) into its own robust Rule 103-833 regarding interrogatories. SCSBA has not suggested that the Companies should propound the standard discovery questions, nor that they need to request leave of the Commission to propound other general interrogatories. Instead, SCSBA asks the Commission to selectively apply a discrete subpart of the S.C. Rules of Civil Procedure that is otherwise inapposite to Commission procedure.

Notably, the Companies cannot recall any instance in recent history in which the Companies refused to provide a response to interrogatories in Commission proceedings

solely on the grounds of any numerical limitation. In these IRP proceedings, alone, the Companies have made available over 3,200 responses to interrogatories and requests for documents, including subparts, to parties. Commission Rule 103-833 is clear—parties must answer *each* relevant interrogatory served upon them,⁴ and the Commission should compel SCSBA to respond to *each* of the Companies’ outstanding questions, including the two sets to which SCSBA has not yet responded.

C. Even Under the Rules of Civil Procedure, DEP and DEC Are *Each* Permitted to Propound Fifty (50) Interrogatories to SCSBA.

Even if the Commission was to find that Rule 33(b)(9) is applicable to Commission proceedings, the Companies’ interrogatories to SCSBA are still within the prescribed limit. As discussed, Rule 33(b)(9) of the South Carolina Rules of Civil Procedure allows each party to propound fifty general questions to another party. Rule 33(b)(9), SCRPC. Here, DEP and DEC are proceeding simultaneously under the two dockets established by the Commission to review their respective IRPs. While the subject matter of the two dockets is similar, DEP and DEC are distinct companies subject to regulation by the Commission, and each have filed separate IRPs in separate dockets which have been combined for judicial efficiency. Therefore, at minimum, DEP is entitled to submit 50 interrogatories to each intervenor in Docket No. 2019-224-E, and DEC is entitled to submit 50 interrogatories to each intervenor in Docket No. 2019-225-E. SCSBA separately intervened as a party with full rights of discovery in Docket Nos. 2019-224-E and 2019-255-E, thereby consenting to being served 50 interrogatories in *each* docket. The Companies’ decision to jointly submit a total of 83 interrogatories to date to SCSBA is consistent with Rule 33(b)(9) and SCSBA’s status as an intervenor in two separate, but related, dockets.

⁴ Unless such interrogatory is objected to on recognizable grounds, which SCSBA’s objection is not.

D. Even if Rule 33(b) Applies to Proceedings Before the Commission, Good Cause Exists For Requiring SCSBA to Respond to the Interrogatories Propounded By the Companies.

To the extent the Commission applies Rule 33(b) to the instant IRP proceedings, “good cause” exists for the Commission to allow more than 50 interrogatories given the nature and complexity of these dockets. Rule 33(b) allows a court to grant additional interrogatories “upon good cause shown[.]” and Commission precedent confirms that the Commission is generally disinclined to limit reasonable discovery. Considering an affirmative request by a party to *limit* interrogatories to 50, the Commission previously determined that it should not “arbitrarily establish[] a limit on the number of interrogatories[.]” *In Re Analysis of Continued Availability of Unbundled Local Switching for Mass Market Customers Pursuant to the FCC’s Triennial Review Order*, Docket Nos. 2003-326-C & 2003-327-C, Order No. 2004-500. Instead, the Commission held “that it is more appropriate for the Petitioners (or any other recipient of discovery) to file objections if and when they believe that they have been served with discovery that is excessive[.]” *Id.* (internal citation omitted). Commission precedent, therefore, suggests that the Commission does not interpret the 50 interrogatory limit in Rule 33(b)(9) to automatically apply to all Commission proceedings, especially where there is a reasonable need for additional information.

SCSBA has not alleged, much less made, any showing that the Companies questions are unreasonable, burdensome, or otherwise excessive in light of the complexity and importance of the issues in these proceedings. *See* Rule 26(a), (b), SCRCPP.

The Companies interrogatories are not only reasonable, they are necessary to the full development of the record in these complex IRP proceedings under Act 62. SCSBA has filed more than 300 pages of expert testimony and exhibits related to the Companies’

IRPs. In order to adequately probe the bases of SCSBA's extensive expert testimony, the Companies fully (and expeditiously) utilized the written discovery tools available under South Carolina law, including the express and explicit rights to obtain reasonable discovery under the IRP statute in Act 62 itself, as discussed above. The Commission should compel SCSBA to respond to the Companies' interrogatories, so that SCSBA's experts' alternative recommendations can be fully evaluated.

III. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for all of the foregoing reasons, DEC and DEP respectfully request that the Commission grant their Motion and enter an order compelling SCSBA to:

1. Respond, in full, to Interrogatory Nos. 1-24(c)-(i), 1-25, 1-26, 1-27, 1-28 within five (5) days of the entry of an order;
2. Respond, in full, to the Companies Second and Third Sets of Interrogatories and Requests for Production of Documents as well as any future discovery propounded;

Respectfully submitted, this the 11th day of March 2021.



Rebecca J. Dulin
 Associate General Counsel
 Duke Energy Carolinas, LLC
 Duke Energy Progress, LLC
 1201 Main Street, Suite 1180
 Capital Center Building
 Columbia, South Carolina 29201
 Phone: (903) 988-7130
 Email: rebecca.dulin@duke-energy.com

and

Heather Shirley Smith
Deputy General Counsel
Duke Energy Carolinas, LLC
Duke Energy Progress, LLC
40 W. Broad Street, Suite 690
Greenville, South Carolina 29601
Phone: (864) 370-5045
Email: heather.smith@duke-energy.com

and

Samuel Wellborn
Robinson, Gray, Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
Phone: (803) 231-7829
Email: swellborn@robinsongray.com

*Attorneys for Duke Energy Carolinas, LLC
and Duke Energy Progress, LLC*